BEFORE THE APPEALS BOARD
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL J. FRANKLIN Claimant	)	
VS.	)	
SUTTON-KAUFMAN TRANSMISSION SERVICE Respondent	)	Docket Nos. 261,786; 261,788
AND	)	
DODSON INSURANCE GROUP Insurance Carrier	)	

ORDER

Claimant requested review of the March 27, 2003 Award of Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board (Board) heard oral argument on September 17, 2003.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the claimant. Stephen J. Jones of Wichita, Kansas appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that the underpaid temporary total disability benefits ordered in the Award were not at issue and would be paid.[1] Claimant also advised that the two unpaid medical bills were no longer at issue and need not to be addressed in this appeal.

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[1] The Award granted claimant $384 in unpaid temporary total disability benefits in Docket No. 261,788.

ISSUES

In the March 27, 2003 Award, the ALJ awarded claimant permanent partial disability benefits for a ten percent functional impairment to the right shoulder all attributable to the February 10, 1998, accident. The ALJ declined to award any permanency for the June 14, 2000 accident, finding claimant's accident on that date resulted in a temporary exacerbation. As a result, claimant's recovery was limited to medical compensation and temporary total disability benefits previously paid. Neither disputes this finding. [2]

Claimant, however, contends the ALJ erred with respect to the findings in Docket No. 261,786. Claimant argues that in addition to the right shoulder injury, he permanently injured his neck and is, therefore, entitled to receive permanent partial disability benefits for an "unscheduled" injury. Claimant requests the Board award him a 13 percent whole body impairment as well as a significant work disability pursuant to K.S.A. 44-510e(a).

In contrast, respondent and its insurance carrier argue that the Award should be affirmed, as they maintain claimant's February 10, 1998 work related injury gave rise to a scheduled injury.

The only issue before the Board is the nature and extent of claimant's injury and disability. To the extent the claimant's impairment is found to be to the body as a whole, the Board must consider whether work disability is appropriate. According to the respondent, the claimant was returned to work following both of his accidents, and would still be employed were it not for his termination on March 18, 2002 due to insubordination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a "removal and replacement" technician. He was responsible for removing transmissions and reinstalling them after they had been repaired. On February 10, 1998, claimant suffered an accidental injury when he and a co-employee lifted a motor from a cart. Compensability of this accident is not in dispute.

Claimant received conservative treatment and was later referred to Dr. Terrence Tisdale, an orthopaedic surgeon, who performed arthroscopic surgery to decompress the acromion in his right shoulder on August 18, 1998. This procedure did not provide relief and claimant was referred to a second orthopaedic surgeon, Dr. John Tanksley. After

[2] Both parties agreed that the June 14, 2000 accident, forming the basis for the claim in Docket No. 261,788, was but a temporary aggravation, and that there was no resulting permanency.

surgery on April 16, 1999, claimant again failed to successfully recover and was referred to still another orthopaedic surgeon, Dr. Erik Severud.

Dr. Severud began treating claimant in December of 1999, and at the time, claimant's complaints consisted of pain in his right shoulder and up into the right side of his neck. Dr. Severud diagnosed a torn right rotator cuff and degenerative disc disease of the cervical spine at C6-7 and cervical myofascial pain. The cervical complaints were treated conservatively with physical therapy and trigger point injections. A third surgical procedure was ultimately performed by Dr. Severud on July 23, 2001, to address the torn rotator cuff.

On June 14, 2000, claimant reported a second injury when he was swinging a heavy hammer with his right arm. Although the claimant failed to report the new injury to Dr. Severud, the accident was, nevertheless, reported to the respondent, and was subsequently given Docket No. 261,788. Claimant continued his treatment with Dr. Severud and performed his normal job duties, with the exception of the six week period following surgery when he was off work. He was eventually found to be at maximum medical improvement and released from treatment on March 14, 2002. He was released to return to work without any specific work restrictions.

Dr. Severud rated claimant at an eight percent permanent partial impairment to the body as a whole for his cervical complaints, which is indicated under the AMA *Guides,* DRE Category II. [3] He also assigned an additional seven percent to the right upper extremity which converts to a whole body impairment of four percent. [4] When combined, these ratings yield a 13 percent permanent partial impairment. Dr. Severud initially imposed no restrictions upon claimant's activities but when deposed, he recommended permanent work restrictions of "limited overhead work" and no overhead lifting above 35 or 40 pounds "on a frequent basis." These restrictions were imposed, not to prevent further injury, but to minimize claimant's discomfort.

During the course of his deposition, the doctor was questioned regarding the relationship between claimant's diagnosis and his February 10, 1998 accident. Dr. Severud reaffirmed his opinion that the degenerative disc disease, cervical myofascial pain and chronic rotator cuff with residual pain was, to a reasonable degree of medical

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

[4] Dr. Severud also diagnosed a right medial epicondylitis for which he assessed an additional one percent whole person impairment. While conceding that this condition was not related to either of the injuries that the claimant is pursuing in this case, Dr. Severud nevertheless maintained that it was due to the claimant's ongoing work activities. At the regular hearing, claimant dismissed his claims of personal injury by accident stemming from a series of accidents culminating on his last day worked.

probability, caused by or the natural and direct result of claimant's February 10, 1998 work-related accident. [5]

At his counsel's request, claimant was evaluated by Dr. C. Reiff Brown on February 15, 2001, for treatment recommendations, and again on November 13, 2001. Dr. Brown assigned a ten percent permanent impairment to the right shoulder. He declined to assess any impairment for the neck as he determined claimant's neck pain was derived from muscle spasms in the shoulder girdle which anchors the neck. He also testified that neck pain alone does not constitute a ratable condition under the AMA *Guides*. Dr. Brown recommended claimant avoid lifting frequently above his shoulder level.

Respondent referred claimant to Dr. Philip Mills, a board-certified physiatrist, for treatment recommendations, and later after his third shoulder surgery, for a final rating. Dr. Mills found no basis for assessing an impairment rating to the neck based upon his examination of claimant. As did Dr. Brown, Dr. Mills believes pain alone will not support a rating under the AMA *Guides*. He diagnosed internal derangement of the right shoulder and myofascial pain and assessed 15 percent permanent partial impairment to the right shoulder. He also diagnosed elbow bursitis but Dr. Mills found that condition was unrelated to the claimant's accident. Dr. Mills recommended permanent work restrictions of avoiding prolonged or repetitious overhead work or reach.

Claimant's counsel also asked Dr. Fred Smith, another board-certified physiatrist, to examine claimant on March 25, 2002. Dr. Smith diagnosed an "irritation of the bicipital tendon of his right shoulder . . . the cervical thoracic problem was mostly soft tissue, and that *he may have* had also what's called a greater occipital neuritis." [6] Dr. Smith assessed seven percent impairment of function to the right upper extremity at the level of the shoulder and a three percent impairment of function to the body as a whole for myofascial pain in the cervical thoracic area plus a one percent impairment to the body as a whole for occipital neuritis.

The Board has considered the testimony of each of the physicians, as well as the claimant's own testimony, and concludes that the ALJ erred in finding claimant's impairment was solely a scheduled injury to the shoulder. The Board is persuaded by the testimony of Dr. Severud, the treating physician, who specifically testified the cervical disk disease was caused by or was the natural and direct result of the February 10, 1998 injury. Claimant's complaints of neck pain are consistent throughout the medical records. Dr. Severud evaluated and treated those complaints with both physical therapy and injections. He ultimately rated the cervical complaints at eight percent, as he found them to fall within Category II of the DRE's, consistent with the principles set forth within the AMA *Guides*.

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[5] Severud Depo. at 16; *see also* Severud Depo. Ex. 3.

[6] Smith Depo. at 10 (emphasis added).

Dr. Smith, a board certified physiatrist, examined claimant and also identified cervical problems and ultimately assessed three percent for the cervical thoracic myofascial pain. While the majority of the claimant's physical complaints are undoubtedly attributable to his chronic rotator cuff problems, the existence of his cervical disc disease and its relationship to the accident cannot be ignored nor can Dr. Severud's opinions with regard to causation.

Both Drs. Mills and Brown simply state that neck pain alone will not support a rating under the AMA *Guides*. Here, claimant has evidence of a physiological change, namely cervical disc disease, which an orthopaedist has diagnosed in addition to the subjective complaints of pain. Thus, the contention that claimant has only subjective complaints of pain is inaccurate. For these reasons, the Board elects to adopt the opinions of Dr. Severud as its own and finds that claimant sustained a 13 percent to the body as a whole as a result of the February 10, 1998 accident. The Board also hereby adopts as its own the restrictions imposed by Dr. Severud.

After returning to work for respondent, claimant was involved in a confrontation with respondent's owner, Ray Kauffman. On March 18, 2002, Mr. Kauffman observed claimant, who was on a break, speaking with another employee who was supposed to be working. Claimant was asked to take his break elsewhere. Claimant became aggressive and confrontational with Mr. Kauffman. Mr. Kauffman asked claimant to discuss the matter in the office, away from the rest of the employees. Claimant challenged Mr. Kauffman and asked if he was going to be fired. According to the record, Mr. Kauffman fired claimant on that date because claimant was interfering with the work of the other employees and was belligerent. This was apparently not an isolated event. There had been other instances of aggressive behavior but respondent valued claimant's work and continued his employment. However, the events of March 18, 2002 were sufficient, in Mr. Kauffman's mind, and in that of the ALJ's, to fire claimant.

Given the termination of his employment, claimant alleges entitlement to a work disability under K.S.A. 44-510e. That statute provides in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a

> percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk* [7] and *Copeland*. [8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 1993 Supp. 44-510e, that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. [9]

According to the appellate court decisions, in determining permanent partial general disability, the question is whether the worker has made a good faith effort to find and retain appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

After considering the record as a whole, the Board finds that claimant's conduct on March 18, 2002 demonstrated a lack of good faith in retaining his employment. An injured employee is not exempt from the reasonable rules of the work place. Claimant's conduct in challenging Ray Kauffman was inappropriate behavior and his termination was merely

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[9] *Id*. at 307, 320.

a consequence of his insubordinate behavior. His failure to comply with the fundamental rules of the work place demonstrates a lack of good faith in maintaining his employment relationship and is inconsistent with the principles set forth in *Foulk* and *Copeland*. Respondent was justified in terminating claimant's employment under these facts and circumstances. Thus, the Board finds claimant's termination on March 18, 2002, was proper. Hence, as a result, the ALJ was correct in not awarding any work disability benefits under K.S.A. 44-510e(a). Claimant's Award is limited to his functional impairment of 13 percent to the body as a whole.

All other findings set forth in the Award are affirmed to the extent not inconsistent with the findings and orders set forth herein by the Board.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Bruce E. Moore dated March 27, 2003 is hereby affirmed in part and reversed and modified in part as follows:

The claimant is entitled to 24.14 weeks of temporary total disability compensation at the rate of $351 per week or $8,473.14 followed by 52.76 weeks of permanent partial disability compensation at $351 per week or $18,518.76 for a 13 percent permanent partial general body disability making a total award of $26,991.90.

As of September 29, 2003, there would be due and owing to the claimant 24.14 weeks of temporary total disability compensation at $351 per week in the sum of $8,473.14 plus 52.76 weeks of permanent partial disability compensation at $351 per week in the sum of $18,518.76 for a total due and owing of $26,991.90 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director